



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

June 6, 2022

Re: FOIA Request NLRB-2022-001225

Dear Mr. Ryan McLain (Michigan Nurses Association):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on May 23, 2022, in which you seek all documents in *DMC Harper University Hospital*, Case No. 07-RC-295970. You assumed financial responsibility for the processing of your request in the amount of \$100.00.

We acknowledged your request on May 23, 2022.

Your request is granted in part and denied in part, as explained below.

A search of the Agency's electronic casehandling system, NxGen, has been conducted. This search has located 103 pages of responsive, releasable records from the requested case file, which are attached.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 5, 6, and 7(C) of the FOIA (5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C)). Specifically, redactions have been made to the records to protect internal deliberative material pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Additional redactions have been made to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6), (b)(7)(C).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 5, 6, and 7(C) (5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C)).

Regarding the records being withheld, three pages are withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), including a casehandling log and internal Agency communications.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman*

v. Taylor, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.*

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and her Regional staff concerning prosecutorial policies and strategies in the processing of this unfair labor practice case. Since they contain proposed legal strategy in the case, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and/or opinions of the General Counsel's staff and was created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

Other investigatory records are being withheld under FOIA Exemptions 6 and 7(C) since their disclosure could constitute an unwarranted invasion of privacy.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all information that "applies to a particular individual." *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). "'Similar files' has been interpreted broadly to include '[g]overnment records on an individual which can be identified as applying to that individual.'" *Pavement Coatings Technology Council v. United*

States Geological Survey, 2019 WL 7037527, *8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, *3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6.).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The records being withheld under Exemption 6 and 7(C) are exempt from disclosure under the above balancing test. They are investigative records obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals’ names, addresses, and other identifying, personal information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. See, e.g., *Madeira Nursing Ctr. v. NLRB*, 615 F.2d 728, 731 (6th Cir. 1980); *Masonic Homes v. NLRB*, 556 F.2d 214, 219–221 (3d Cir. 1977) (authorization cards exempt from disclosure because release would constitute a serious invasion of employee privacy. By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public

understanding of the operations or activities of the government.” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat’l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the “public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest.” No such public interest is evident here that outweighs the private interests identified above. For the foregoing reasons, the records are protected from disclosure under Exemptions 6 and 7(C).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Two hours and thirty minutes of professional time were expended in searching for and reviewing for release the requested material. Accordingly, please remit \$92.50.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Joseph Mullaney, the Attorney-Advisor who processed your request, at (202) 273-3863 or by email at Joseph.Mullaney@nrlb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow

the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the

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90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (103 pages)